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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 814

RAYMOND DUVERNAY,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

Petitioner was tried before a jury in the United States District Court for the Eastern District of Louisiana and convicted on August 30, 1966. The Fifth Circuit Court of Appeals affirmed that decision in an opinion filed on February 7, 1968, and reported at 394 F.2d 979 (1968). A petition for rehearing *en banc* was denied on May 14, 1968.

Jurisdiction

This Court was petitioned to accept jurisdiction under 28 U.S.C. § 1254 on June 24, 1968. That petition for a Writ of Certiorari was granted December 9, 1968. The motion for leave to proceed *in forma pauperis* was granted on the same day.

Constitutional and Statutory Provisions Involved

The principal constitutional and statutory provisions involved are the Fifth, Thirteenth and Fourteenth Amendments to the Constitution and 50 U.S.C. § 462, 32 CFR 1625.1, 32 CFR 1625.2, 32 CFR 1625.11, 32 CFR 1625.13 and 32 CFR 1625.14. Due to their length, the statutory provisions are reproduced and appended hereto.

Questions Presented

1. Can a criminal defendant on trial for refusal of induction be denied the right to raise constitutional defenses where the board below had no jurisdiction of such questions and civil actions in advance of induction are prohibited?

2. Can constitutional defenses be waived on a criminal trial by failure to raise them before Selective Service boards below?

3. Can a Selective Service Board reconsider a classification upon a prima facie showing of facts justifying an exemption and refuse the registrant an appeal?

4. Can a Selective Service Board properly and effectively delegate its responsibility and authority to classify and to consider applications for exemptions to the clerk?

5. Is systematic exclusion of black people from service on local board No. 42 a violation of this black petitioner's right under the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution?

6. Is an induction order valid and binding when it has been issued by a Selective Service Board from which black persons have been systematically excluded?

Statement of the Case

Petitioner is a young Negro man, now twenty-three years of age who, upon reaching his eighteenth birthday, registered as required with the Selective Service System. He received a I-SH deferment due to his status as a high-school student (R. 28). Upon his subsequent enrollment in college, he was given a II-S classification (R. 28). In early 1966, petitioner left college. Upon learning that petitioner was no longer in school, the Local Draft Board reclassified him I-A on January 19, 1966.

Petitioner subsequently was employed by the Social Welfare Planning Council where his duties consisted of doing social work among the poor in his home town, New Orleans, Louisiana (R. 29). It appears that he began that employment sometime in March, 1966 (R. 38). His family being in need of the financial assistance he could then provide (R. 39), petitioner began regularly to lend substantial financial support to his mother and six brothers and sisters (R. 39). On April 13, 1966, petitioner's Local Board sent him a notice to report for induction on May 20, 1966 (R. 15).

After receiving the April 13 notice, petitioner made numerous attempts to obtain deferments to which he believed himself entitled, alone and with his mother, petitioner appeared at the Local Board and presented to the Clerk evidence which should have entitled him to a hardship or dependency deferment (R. 17, 32, 39-41). On May 12, 1966,

one of petitioner's supervisors, the Associate Executive Director of the Social Welfare Planning Council, wrote a letter to the Local Board on petitioner's behalf (R. 18). Another supervisor thereafter appeared at the Local Board to further assist petitioner in presenting information entitling him to an occupational deferment (R. 33, 37-38).

The record contains much evidence establishing the fact that the Local Board was giving some attention to petitioner's request for deferment. One board member, Mr. Bozonier, testified that at one board meeting, which appears to have been on April 27, 1966, two hundred and thirty-four registrants were classified or reclassified. It was presumably at that meeting that petitioner's claim for dependency and hardship deferment was reviewed because on April 28, 1966, the Local Board by letter informed petitioner that his claim had been "given careful consideration" (R. 85). No change in his status was then made and he was not informed of any procedures available to him to further press that claim before the Board or to appeal the Board's "consideration".

Testimony at trial revealed that the letter of petitioner's supervisor, written on May 12, 1966, was also "discussed at one of the meetings" of the Board (R. 52). Thus, on a second occasion subsequent to the issuance of petitioner's induction notice but prior to its effective date, the Local Board discussed petitioner's status. And again, on this second occasion, petitioner was given no information regarding means available for pressing his claim for occupational deferment before the Board or for appealing the Board's conclusion.

Testimony and proffered proof at trial established that no Negroes have served on petitioner's Draft Board in the

past five years. Petitioner further offered to prove that no Negro has ever served on petitioner's Draft Board. The Chairman of petitioner's Board, however, was a known member of the Ku Klux Klan as would have further been conclusively established had evidence relevant thereto been permitted at trial.

On May 20, 1966, petitioner reported to the induction center pursuant to the Board's order. He completed the entire procedure there with the exception of refusing to step forward to be inducted.

An indictment was filed on June 6, 1966, charging petitioner with violation of 50 U.S.C. 462. A trial by jury was held, and a verdict of guilty was returned on August 30, 1966. The conviction was affirmed in the Court of Appeals on February 7, 1968. It is from that judgment petitioner appeals.

Summary of Argument

This term of Court, the Court has ruled that preinduction judicial review of Selective Service cases is not available in the vast majority of circumstances. *Oestereich* v. *Selective Service System,* No. 46 (October Term 1968, 1 S.S.L.R. 3215) and *Clark* v. *Gabriel,* No. 572 (October Term 1968, 1 S.S.L.R. 3220). The registrant has, except in exceptional circumstances, been relegated to raising his objections to his classification or otherwise testing his status, by way of defense to a criminal proceeding. Mr. Justice Harlan, concurring in *Oestereich* v. *Selective Service System, supra,* has elucidated further the court's ruling, stating that one reason underlying it is the fundamental incompetence of the administrative agency to effectively handle questions of constitutional law. 1 S.S.L.R. at 3217. This being the case,

petitioner appeared before a judicial forum to present, by way of criminal defense, his constitutional argument and objections to his classification and he was met by an absolute "bar" to the court's entertaining those issues on the ground that he should have raised them before the administrative agency. *DuVernay* v. *United States,* 394 F.2d 979. Thus, the sum total of the situation—combining this court's ruling in *Oestereich* and *Gabriel* with the Fifth Circuit Court of Appeals' ruling in *DuVernay* is that " . . . petitioner [will be deprived] . . . of his liberty without the prior opportunity to present to any competent forum—agency or court—his substantial claim that he was ordered inducted . . . " unlawfully, 1 S.S.L.R. at 3217, Mr. Justice Harlan, concurring.

The ruling of the Fifth Circuit Court of Appeals requiring petitioner to present to his inaccessible all-white Local Draft Board constitutional arguments relating to the total lack of procedural due process in his processing and the systematic exclusion of Negroes from his Draft Board defies both law and logic. As suggested by Mr. Justice Harlan in *Oestereich,* the Board is not competent to hear such arguments, nor indeed is the petitioner or any other young registrant, unaided by counsel and ignorant of his rights, competent to present such arguments.

Petitioner herein made available to his Board all the evidence necessary or that he believed necessary, to substantiate his claims for deferment. There was nothing more in that respect that he was able to do; or if there was an avenue for appeal, it was never made known to petitioner.

Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and pursuant to 32 C.F.R. § 1622.1 (b) and (d) petitioner has the right to fair and non-

discriminating treatment before his local draft board. For the past five years, although there are many members of the black community who are qualified to serve, no black person has been appointed to petitioner's local board. Systematic exclusion of blacks is a denial of petitioner's constitutional right against the potential threat of racial discrimination and his statutory guarantee that he will receive fair and unbiased treatment. In addition, 50 U.S.C. App. § 460(b)(3) recognizes a right of citizen participation in the operation and administration of local draft boards. Under the Fifth and Fourteenth Amendments to the United States Constitution black people are entitled to the enjoyment of the same federal rights and privileges enjoyed by whites. Moreover, the denial of the opportunity to participate in the operation and administration of local draft boards is a violation of the Thirteenth Amendment to the United States Constitution, in that the inability to so participate constitutes a badge and indicia of slavery. *Scott* v. *Sandford*, 19 How. 393, 60 S.Ct. 691 (1857).

An induction order issued by a board from which blacks have been systematically excluded is void as matter of law. The order is a direct violation of petitioner's guarantee against discriminatory treatment and his right to be free of all badges and indicia of slavery. "The evil of racial exclusion cannot be ignored . . . " and this Court is obligated to "fashion judicial remedies to the realities to assure actual enjoyment of the constitutional ideals". *Brooks* v. *Beto*, 366 F.2d 1, 24-25 (5th Cir. 1966). The lesson we have learned from a history of jury cases before this Court is that the only realistic way to protect against the evils of systematic exclusion is to invalidate the orders issued by the body from which blacks have been systematically excluded.

ARGUMENT

I.

If Petitioner Is Foreclosed From Presenting His Constitutional Arguments by Way of Criminal Defense to Prosecution for Refusal to Submit to Induction, He Will Be Denied the Right to Ever, in Any Competent Forum, Present Those Claims for Consideration.

In *Oestereich* v. *Selective Service System,* No. 46 (October Term, 1968) and in *Clark* v. *Gabriel,* No. 572 (October Term, 1968) this Court held that, apart from exceptional circumstances not here applicable, registrants with the Selective Service System may raise objections to their classifications, including constitutional objections only by way of defense to a criminal prosecution or by *habeas corpus* to obtain release from service. At least one mainstay of this ruling lies in the opinion of Mr. Justice Harlan, concurring in *Oestereich.*

> "Second, a challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity, but presents an issue beyond the competence of the Selective Service boards to hear and determine. Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. * * * Such authority cannot readily be inferred, for the composition of the boards, and their administrative procedures, render them wholly unsuitable forums for the adjudication of these matters. . . ." 1 S.S.L.R. at 3217.

Selective Service registrants are thus relegated to the judicial rather than the administrative forum and told to raise their judicial arguments in defense to the criminal prosecution. Petitioner has done precisely that which this Court ordered be done in *Clark* v. *Gabriel, supra.*

Upon taking his constitutional arguments to the Federal Court, however, petitioner was met with the ruling that he should have presented his constitutional claims to the Local Draft Board and his failure to do so foreclosed judicial consideration of those claims. This ruling flies in the face of Justice Harlan's opinion in *Oestereich, supra,* and is contrary to the most fundamental and historic precedents of law in this area. *Parrott* v. *United States,* 370 F.2d 388 (1966), cert. den. 387 U.S. 908 and *Wills* v. *United States,* 384 F.2d 943 (C.A. 9, 1967), cert. den. 36 L.W. 3473 (1967), and *Hart* v. *United States,* 382 F.2d 1020 (C.A. 3, 1967), cert. den. 1 S.S.L.R. 3087, 3088, Justice Douglas, dissenting.

Yet even more serious than the basic error of the assertion that constitutional agreements should be presented for administrative decision is the result which inevitably flows from the conclusion of the Fifth Circuit Court of Appeals' decision: If the administrative agency is incompetent to consider constitutional issues and the court refuses to hear those issues unless they are first presented to the Board, petitioner will be denied all review of his constitutional claims and "... depriv[ed] of his liberty without the prior opportunity to present to any competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure." 1 S.S.L.R. at 3217.

II.

Exhaustion of Administrative Remedies Is a Wholly Inappropriate Doctrine to Apply Where Questions of Constitutional Law Are at Issue.

The Court below does not really base its exhaustion of administrative remedies decision on any supposed failure of petitioner to present facts relevant to his classification to the Local Board. Although the opinion details the procedures for presentation of facts to the Board and appeal of Board determinations, the Court ruled that the defenses of due process of law and exclusion of Negroes from the Selective Service machinery were waived by petitioner's failure to present those purely legal, constitutional issues to his Local Board. Such a ruling is totally without support in law or logic.

It has long been established that adjudication of constitutional matters is beyond the competence of administrative agencies. *Staub* v. *Baxley,* 355 U.S. 313 (1958); *Thomas* v. *Collins,* 323 U.S. 561 (1945); *Public Utilities Commission* v. *United States;* 355 U.S. 534 (1958).

As Mr. Justice Harlan concurring in *Oestereich* v. *Selective Service System,* 155 L.R. 3215, 3217 stated:

> ". . . a challenge to the validity of the administrative procedure itself . . . presents an issue beyond the competence of the Selective Service boards to hear and determine. . . .
>
> . . . their administrative procedures render them wholly unsuitable forums for the adjudication of these matters . . ."[1]

[1] Indeed it is difficult to imagine the means available to petitioner for raising his constitutional challenges to the Board. It need not

See also *Wills* v. *United States,* 384 F.2d 943, 945 (1967), cert. den. 36 L.W. 3473 (1967) ("[An] objection founded upon a claim of constitutional right, was one which courts have little reason to defer to the administrative determination."), and *Hart* v. *United States,* 382 F.2d 1020 (1967), cert. den. 1 S.S.L.R. 3087-3088. Mr. Justice Douglas dissenting (". . . whatever effect the exhaustion of administrative remedies doctrine may have on the classification issues, it is wholly inapplicable to the constitutional question.") *United States* v. *Carson,* 282 F.Supp. 261, 271 (E.D. Ark., 1968) ("The experience of the administrative boards and agencies will generally render them better equipped than the courts to solve factual problems, within their respective fields, but, as stated in *Wills, supra,* where the dispute is a question of law, 'the exhaustion rule loses much of its force' . . ."), *Unglesby* v. *Zimny,* 250 F.S. pp. 714, 717 (1965); *Lee County School District No. 1* v. *Gardner,* 263 F.Supp. 26, 31 (1967); Jaffe, *The Exhaustion of Administrative Remedies,* 12 Buffalo L.Rev. 327.

As Justice Harlan further points out, not only are the Boards incompetent to hear constitutional issues but registrants are incompetent to raise them—and their failure to raise them cannot be held to be a "waiver" of those issues. In *Oestereich,* Justice Harlan stated:

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be agreed that one cannot expect a twenty-year old Negro youth to complain to his segregated draft board, particularly given its alleged Ku Klux Klan taint, that Negroes are excluded from the Board. And there is little more sense to suggesting that this youth, unfamiliar with the procedures of the Board and his rights relating thereto and unaided by counsel, should file some sort of paper with his Board complaining of the denial there accomplished of his right to due process of the law. In short, not only is there no reason to present constitutional arguments to a Local Board, as Mr. Justice Harlan suggests, the Board procedures admit of no means for so doing.

> "... the fact that a registrant may not be represented by counsel in Selective Service proceedings, 32 C.F.R. 1624.1(b) seems incompatible with the boards' serious consideration of such purely legal claims. Indeed the denial of counsel has been justified on the ground that the proceedings are non judicial." 1 S.S.L.R. at 3217.

Registrants are not only unrepresented by counsel before their boards but are young, frequently ill-educated and ignorant of the intricacies of Selective Service procedures. They may be intimidated by their boards, misled as to their rights and not provided with information as to the existence or identity of Selective Service advisors who might be of assistance to them. Though informed on the back of their Notice of Classification of certain duties required of them, they are not informed, even in so casual a manner, of the consequences of failure to promptly comply with those requirements. The registrant may have no real sense of what deferments are even available to him and hence even if he knows of and understands his rights to a personal appearance and appeal, he may not know the grounds for contesting his classification. With such pitfalls as these built into the administrative procedure, it is unconscionable to suggest that the unwitting registrant is bound by his failure to raise and protect all of his constitutional arguments before his Local Board. Cf. *Application of Gault*, 387 U.S. 1 (1967); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Cornley* v. *Cochran*, 369 U.S. 506 (1962); *Lockhart* v. *United States*, No. 21,311 CA 9th Cir. (October 23, 1968).

The court below has apparently confused notions of "exhaustion of remedies" with those of "finality of decision". While a registrant may not simply avoid adminis-

trative procedures and appear prematurely in court, once the final determination of the registrant's status has been made, the issue is ripe for judicial review. This distinction is likewise made clear in Justice Harlan's concurring opinion in *Oestereich*:

> "... the boards can provide no remedy for a registrant's claim that the regulations or statutes are themselves invalid. (This is not to say that a registrant making such a claim may come into court before he has exhausted his administrative appeals, for the system may decide in his favor on other grounds, obviating the need for further review.)" S.S.L.R. at 3218.[2]

There was, in the instant case, nothing more that petitioner could do, nor indeed was there anything more that the System could do to petitioner prior to his prosecution that could obviate the need for judicial review. Hence, there being nothing waived by petitioner before his Board and all Selective Service decisions affecting petitioner being

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[2] In *Falbo* v. *United States*, 320 U.S. 549 (1944) and *Estep* v. *United States*, 327 U.S. 114 (1946), this court ruled that a registrant must participate fully in the administrative process even to the point of reporting for induction and if he, at that point, refuses to submit, he may request judicial review of his classification. Cf. *Lockhart* v. *United States*, No. 21,311, Ninth Circuit Court of Appeals, October 23, 1968, see opinion of Circuit Judge Browning concurring. The purpose of this rule clearly was to avoid having to judicially confront and determine issues which could either have been resolved by administrative action or otherwise obviated, viz. by physical examination where the registrant was found unfit for service.

Petitioner herein did participate as fully as he could in the administrative process going "to the brink" before seeking judicial review. And as to constitutional arguments, *Falbo* and *Estep* are inapplicable as a matter of law, no purely legal or constitutional question could be settled finally by the administrative process. The petitioner having exhausted the available administrative process and being found physically fit, has entered the court with a "final" administrative decision ripe for judicial review.

final, the courts below should have considered the merits of his defense in the criminal proceedings.[3]

While a registrant can reasonably be assumed to be aware of at least some of his rights to a classification or to a deferment and can conceivably make an effective waiver thereof, it would be most unusual for those subject to Selective Service to be cognizant of their possible constitutional protections under the System, and to be able to waive such sophisticated protection. Without early participation of counsel this would not be possible. In practice what happens is that most of the subjects of the system have no real knowledge of how it operates or of what it produces in terms of general or specific results.

DuVernay could not waive what he did not know, nor could he waive what it was impractical for him to know. He certainly did not know that he could not sue in advance of reporting for induction for judicial review of his reclassification.[4] There was also no real way to know the

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[3] Judicial review of Selective Service cases has for many years been recognized to include consideration of whether the registrant was denied basic procedural fairness in the Selective Service proceedings. *Parrott* v. *United States,* 370 F.2d 388 (1966), cert. den. 387 U.S. 908; *DeRemer* v. *United States,* 340 F.2d 712 (1965); *Blalock* v. *United States,* 247 F.2d 615 (1957); *United States* v. *Peebles,* 220 F.2d 114 (1955).

[4] See 50 U.S.C. § 460(b)(3).

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President *only when there is no basis in fact for the classification assigned to such registrant.*" (Emphasis added.)

procedure by which the Board had reclassified him or had reconsidered his case and refused his plea for deferment. Finally, he could hardly have had access, short of a criminal trial, to the fact that members of his race were excluded from his Board, and that its chairman was the President of the United Klans of America, Inc.

Even though the Court below sought in its opinion to distinguish *Wolff* v. *Selective Service Board No. 16,* 2nd Cir. 1967, 372 F.2d 817, as a first amendment case, it was concerned enough with the waiver question to write:

> "Though we do not believe the reasoning of *Wolff* is applicable to the instant case, we are moved to express doubt as to the continuing validity of that decision. Congress amended 50 U.S.C. App. § 460(b)(3) in 1967, several months after the decision in *Wolff,* in such a way as to emphasize that exhaustion of administrative remedies is a prerequisite to judicial review:"

It is difficult to see where, under the definitions contained in § 460(b)(3), DuVernay failed to exhaust his administrative remedies since he responded to the Order of Induction by making a personal appearance. He simply did not allow himself to be inducted.

If the court below relies upon § 460(b)(3) to support its exhaustion theory, we must say that we think § 460(b)(3) is unconstitutional. This amendment to the Act attempts to declare that neither this court nor any other Federal Court can, in any way, review the decisions of a Selective Service Board if the Board has acted to classify a registrant with *"some basis"* in fact. This is an attempt to restrict the jurisdiction of this and the other Federal Courts over constitutional issues without amending the Judiciary Act of 1789.

It can be conceded that review of *classification* could be withheld from the judiciary if there was "some" basis in fact for the board's action. Here, however, § 460(b)(3) would preclude judicial review of "jurisdictional", i.e., *constitutional* issues in such a situation. This is something new. It also is incorrect. A Selective Service Board may have classified an applicant on the clear basis of "some" facts but it may also have done so in a most flagrant and unconstitutional way. Obviously in such a situation, the due process issues must be reviewable by the Federal Courts and at the very least, in the defense of a criminal prosecution. As § 460(b)(3) would put it, however, where there is some "basis in fact" for the classification, such "jurisdictional" or "processing" (i.e., due process), review would be foreclosed.

Therefore § 460(b)(3) does not, by its own terms, belong in this set of facts since DuVernay *did* respond to the induction order, and moreover it cannot constitutionally be an impediment to a judicial review of the due process or jurisdictional questions in this case, since to make the availability of such review rest on what amounts to the scintilla rule, is to give a veto power to administrative boards over federal courts on constitutional issues.

DuVernay's Board has no jurisdiction to consider its own procedures or composition. This is what is meant by the holdings in *U.S.* v. *Peebles,* 220 Fed. 114 (1955), and *Niznik* v. *U.S.,* 173 F.2d 328. In *Peebles* the Seventh Circuit held:

> "(1-3) Defendant, under due process, had a right to have the Board consider his evidence fairly and without prejudice. 'A draft board loses jurisdiction when it proceeds arbitrarily and without due regard to the rights to which a registrant is entitled under the regu-

lation.' Niznik v. United States, 6 Cir. 173 F.2d 328, 336. The record before us clearly demonstrates that the Local Board did not give defendant a fair hearing on his claim for exemption as a conscientious objector. Apparently the Board was of the view that because defendant did not make his claim when he executed his questionnaire nor at the time he attempted to obtain a II-C classification, that he could not later obtain a classification as a conscientious objector. The persistence of defendant in pressing his claim engendered antagonistic feelings against him by the Board members. It was soon apparent that the entire Board was bristling with hostility toward defendant. This was shown at the time the Board was required to reopen the case to consider defendant's claim for exemption as a conscientious objector. The Board did finally reopen the case 'reluctantly'. The chairman of the Board voted to reopen 'with the greatest feeling of shame and reluctance', the secretary was of like mind while the third member voted against reopening in spite of the request made by General Hershey and the Regulations notwithstanding. As might be expected the Board made short shrift of defendant's claim for exemption by voting on the same day that he be given a I-A classification once again."

While the administrative appeal process may be a valid method of review of classification and other discretionary matters such as deferments, it cannot be the method of review of a refusal to be inducted based on constitutional grounds since at that point it becomes a court matter and actually the Selective Service System has completed its job. See *Gibson* v. *U.S.* (1946), 329 U.S. 338.

If the boards alone could finally pass on such questions, the answer would be foreclosed in favor of the Selective Service System. Obviously, the System is not going to eliminate its own boards, or void its own procedures. There is no way within the act for this to be done. The only review of these issues lies with the courts. *Estep* v. *U.S.*, 327 U.S. 114, 66 S.Ct. 423 (1946).

In *Estep* the court decided this very situation. There the refusal was to be inducted and the court said there *is* a right of Judicial Review of these so-called *final* orders of the Board. In *Estep* it was claimed that the Board by being arbitrary, had lost jurisdiction. The Court agreed and held that the right of judicial review was unimpaired.

When the courts classify a constitutional defense to a criminal charge as waived, they then say in effect that what cannot be done in selective service cases will be done in habeas corpus cases. In *Fay* v. *Noia*, 372 U.S. 391 (1962), this Court held that where there were no available state remedies to exhaust, even though there had been some available at some times in the past and they had not been taken advantage of, that still, Federal Review of the constitutional rights of the accused were available. In effect the Court below invites the accused to enter the Army and petition for habeas corpus. That method of relief as we all know is certainly inappropriate.

Mr. Justice Douglas in *Estep* v. *U.S.* (*supra*), wrote:

> "It has been assumed that habeas corpus is available only after a registrant had been inducted into the Armed Services. But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him

> to challenge the jurisdiction of the Local Board after conviction by habeas corpus. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow."

The court then established that Judicial Review is available and ordered new trials where the defendants were to be given an opportunity to show that their local boards had exceeded their jurisdiction.

Mr. Justice Murphy, in concurring, pointed out then what has happened here:

> "To sustain the conviction of the two petitioners in these cases would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based on an invalid administrative order . . . (that) violates the most elementary and fundamental concepts of due process law."

Further, on this point—if DuVernay could not sue in advance for classification review, and if the board not only lost jurisdiction by abandoning due process but never had power at all over constitutional issues, and these points could be effectively waived before a criminal trial, then they may as well have never existed at all as far as this defendant is concerned. He would simply go to jail regardless of the Constitution. See *Hart* v. *United States,* 391 U.S. 956, 959 (1968) (dissent).[5]

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[5] Furthermore, the doctrine of exhaustion cannot apply to constitutional questions because:

> "[T]he Appeal Boards in the Selective Service System do not appear to have jurisdiction to pass on constitutional questions;

Finally, the opinion below, based on waiver, is inconsistent with that long line of cases in the 5th Circuit truly represented by *Seals* v. *Wiman*, 304 F.2d 53 (1962). In effect, the court below is saying that a young Negro registrant who knows only that students aren't drafted, but unknown to himself has a perfectly good hardship deferment, and who had no lawyer and who had no knowledge of the procedures of the Board intelligently waived all rights not only to the deferment, but to his constitutional guarantees of due process and equal protection.

How did DuVernay know that by helping his mother support herself and his 6 brothers and sisters he had a claim which any reasonable Draft Board would honor as a deferment?

How did DuVernay know that he was classified in reality by the clerk of the Board and not the Board itself—all contrary to the regulations?

How was DuVernay to know that the chairman of his Board was president of the United Ku Klux Klans of America?

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nor may registrants appeal such questions to them . . . The Appeal Board's jurisdiction is limited to review of decisions of the Local Boards . . . and nothing in the Act or Regulations indicates that Local Boards may pass on the constitutionality of a peacetime draft . . .

[E]ven if petitioner's Appeal Board could have considered the constitutional question raised here it seems clear that an appeal on such ground would have been a futile gesture [see *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (C.A. 2d Cir.)], since it would be the equivalent to asking the Selective Service System severely to undercut its own authority and to overrule itself (see *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 539; 3 Davis, Administrative Law, Section 20.04 (1958). 391 U.S. at 960.

How was DuVernay to know that while his board recalled induction notices to policemen it wouldn't [illegible] those sent to poverty workers?

How would DuVernay, a Negro, know that no Negroes had served on his Draft Board for the last five years?

In short, how was DuVernay to know that his board operated pretty much as it pleased and simply ignored the rules?

The answer to the above questions obviously was not only that he didn't know these things, but couldn't. In fact most of them would never have been known had there been no prosecution. If this is the case, and it is, then how can DuVernay, then without a lawyer, be any more able to waive his right than Willie Seals was able to waive his?

Clearly, there was no waiver here. The matter should be reversed.

III.

Petitioner Did Exhaust All Administrative Remedies Known to Him Relating to All Matters Within Administrative Competence and Exercise.

The critical error in the decision below brought to this Court for review lies in the following reasoning of that Circuit Court:

> "On this appeal, DuVernay relies principally on the argument that the indictment against him should have been dismissed by the district court because Negroes have been systematically excluded from membership on Local Board No. 42 * * * In addition to this contention, he alleges that he is entitled to a new trial because the local board's method of handling his case reflects a denial of due process. Finally it is alleged that the trial judge committed reversible error when he refused to permit questions concerning the Ku Klux Klan affiliations of the man who was chairman of the board when appellant was classified I-A.
>
> "We affirm the conviction on the ground that all of appellant's contentions are foreclosed by his failure to exhaust administrative remedies."[6] 394 F.2d at 980.

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[6] In order to make clear the fact that but for the alleged failure to exhaust administrative remedies, petitioner would not have been subject to induction, petitioner directs the court's attention to the following language in 394 F.2d at 982: "We further conclude that appellant could have obtained a deferment subsequent to his reclassification if he had taken the appropriate steps and given appropriate reasons." Thus it is arguable that even the court below recognized that only petitioner's failure to make certain information known to his Board within a space of ten days time has led to his notice to report for induction, indictment, conviction and a pending jail sentence.

The issues underlying the court's conclusion are first, whether petitioner did in fact exhaust all the available and effective administrative procedures, and second, what consequences flow from petitioner not having pressed his constitutional arguments before his Local Draft Board. There can be no doubt about the fact that petitioner presented to his Local Board all the *facts* relevant to his draft status. No facts relating to his draft classification were raised for the first time at trial. A brief review of the chronology of his processing divides logically into the following two periods:

i) On January 19, 1966, upon learning that petitioner was no longer enrolled in college and thus no longer entitled to II-S status, the Local Board classified him I-A. Petitioner did not appear personally at his Local Board to protest that classification. He did not appeal it. He did nothing to contest his I-A status for one and only one reason: He was neither medically unfit, occupationally deferrable, deferrable due to hardship or dependency, or deferrable as a student—in short, there was no appeal taken because *there was no basis for an appeal* within ten days of receipt of the January 19, 1966 reclassification.

The Court below, however, completely ignoring the critical fact that no appeal was taken because there was no ground for appeal, characterized the situation as follows:

> "Yet, he made no effort to appeal his I-A classification until he received an order of induction. By this time he had waived his administrative remedies. Section 1624.1(a) of the regulations requires as a first step in the appellate process that a registrant file a written request for personal appearance before the board within ten days from the time the board mails a notice of

classification. After the ten-day period has expired, there can be no personal appearance. . . . [h]e waived his right to a personal appearance and his subsequent right to appeal . . ." 394 F.2d 980-981.

To view the failure of petitioner to pursue a totally empty and futile appeal as an essential prerequisite to taking subsequent newly-relevant effective appeals or to raising constitutional issues in a criminal trial is to create a Selective Service regulation where none now exists and to raise serious and substantial question as to the constitutional validity of such a rule. The language of the court below suggesting that petitioner "had waived his administrative remedies", 394 F.2d at 980 is therefore wholly inapposite unless this court affirms the decision below which would require the pursuit of an empty appeal in order to preserve the subsequent right to a meaningful and substantial one.

ii) In approximately March, 1966, petitioner became employed in a job which could provide a basis for a II-A[7] occupational deferment. A substantial portion of his salary therefrom was given to the support of his family, thereby forming the basis for a III-A,[8] hardship dependency deferment.

The Notice of Classification which had been issued to petitioner in January, 1966, contained the following information on the back of the card:

"The law requires you to notify your local board in writing (1) of every change in your address, physical

[7] See 32 C.F.R. §§ 1622.22 and 1622.23.

[8] See 32 C.F.R. § 1622.30.

condition, and occupational, marital, family, dependency, and military status, and (2) of any other fact which might change your classification within 10 days after it occurs."

Assuming *arguendo* that this form of notification on the reverse side of the card is sufficient notice of the requirement to report the new employment secured, it can hardly be argued that failure to give such information within ten days can be held to be a waiver of the right thenceforth even to present it. Petitioner, in 1966, was a twenty-year old youth with little more than a high school education. He had absolutely no way of knowing—short of reading all of the regulations governing Selective Service procedure—that failure to notify the Board of his newly undertaken employment within ten days would foreclose his right even to rely upon it. In such circumstances, there can be, as a matter of law, no knowing and intelligent waiver of his rights. As this Court stated in *Application of Gault,* 387 U.S. 1 (1967):

"... [Petitioner's mother] testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might obtain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. * * * Mrs. Gault's knowledge that she could employ counsel was not an 'intentional relinquishment or abandonment' of a fully known right." 387 U.S. at 41-42.

Petitioner's Local Draft Board did not in fact treat the expiration of the ten day time limit as an absolute bar. Instead, subsequent to sending petitioner his notice to report for induction, the Local Board accepted, for some sort of consideration, evidence relating to petitioner's changed status.

The procedures prescribed for processing such information appear in Selective Service regulation 1625.2.[9] In relevant part, 1625.2 allows for reopening and reconsideration of a registrant's classification upon the presentation of facts not considered when the registrant was classified " . . . which [facts], if true, would justify a change in the registrant's classification."[10] Thus if the registrant presents evidence sufficient to warrant a change in his classification, the Board will reopen his file and reclassify him. If the Board, after reopening the file, decides not to reclassify the registrant,[11] he then has a right to appeal the Local Board's decision. 32 C.F.R. 1625.11.

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[9] The full text of that regulation is set forth in the Appendix hereto, p. 57.

[10] Section 1625.2 specifically notes that no reopening is possible subsequent to the issuance of an Order to Report for induction unless there has been a change in the registrant's status subsequent to the issuance of the order resulting from circumstances beyond the registrant's control. The Board however proceeded to give attention to petitioner's status despite the prior issuance of the Order to Report and hence apparently did not consider itself bound to refuse to receive such evidence.

[11] As 1625.2 permits reopening only where the evidence presented to it, if true, would justify a change in classification, it must be assumed that the only occasion for reopening but not reclassifying is one in which registrant's claim of occupational, hardship, or other deferment is not borne out by the facts, i.e., he, in fact, has no job in the national interest or is not in fact, supporting his family. No such contest as to the *facts* presented by petitioner herein was ever even suggested. Indeed, as the Court below stated, " . . . there is

Section 1625.11[12] provides that any action of the Board subsequent to reopening is tantamount to a new classification and is subject to appeal as a new classification. In other words, once the file is reopened, if a new classification is given *or* if the old classification is retained, the registrant has a right to an administrative appeal of the Board's decision.

While it is clear that subsequent to reopening, a registrant may appeal the Board's decision, it is equally and crucially clear that:

1) If the Board decides *not* to reopen a file, *no* appeal of that decision is available, and

2) Petitioner's Local Board, though informing him in one instance that it had "given careful consideration" to his claim, and in another instance, considering his claim without ever notifying him at all to that effect, never made clear whether the file had been reopened, thereby giving rise to an appeal or whether no appeal lay due to the failure to reopen.

The Court below having suggested that the facts presented might have led to a deferment but for their "untimely" presentation, 394 F.2d at 982, petitioner may only assume that for reasons unknown and, according to Selec-

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no reason to believe that the Local Board, or at least the Appeal Board, would not have granted another deferment if legitimate reasons had been presented within the *prescribed time limits.*" 394 F.2d at 982. (Emphasis added.) Thus it is unlikely that the Board did reopen petitioner's file but decided not to change his classification as such event could only occur if the facts do not bear out the registrant's claim for deferment and no such circumstance was ever suggested in this case.

[12] The full text of Section 1625.11 is set forth in the Appendix hereto, p. 58.

tive Service file procedure, unknowable, his was not reopened and no appeal from the Board's refusal to reopen was available.

The Court below did not recognize the fact that once grounds for challenging his I-A classification existed, petitioner presented all those facts to his Local Board, the only "forum" available to him. Rather, the Circuit Court stated:

> " . . . the board is powerless to reopen a classification after the order of induction has been mailed unless it specifically finds there has been a change in the registrant's status resulting from circumstances over which he had no control. There is no evidence that DuVernay's status changed in this way after the order of induction was mailed. Thus, the mailing of the order of induction extinguished his last right of administrative appeal before he had even begun to challenge his I-A classification." 394 F.2d at 981.

Although the letter of the law, Section 1625.2 in fact forecloses reopening after the Order issues unless new circumstances beyond the registrant's control appear, the Board appears not to have followed that interdiction. Had it done so, the language of the Circuit Court would correctly represent what had in fact happened. Evidence is available and appears throughout the transcript of the trial establishing the fact that the Board considered petitioner's status subsequent to the issuance of the Order to Report, despite the limitation on *newly* relevant circumstances. That such procedure is not uncommon is borne out by the record in *United States* v. *McKart,* 395 F.2d 906 (C.A. 6, 1968). In *McKart*, the registrant's Local Board, subsequent not only to issuance of the Order to Report but after the effective

date of the Order had passed, reclassified the registrant from I-A to IV-A on the basis of a fact appearing on the registrant's initial registration form and existing for close to twenty years. Surely this information forming the basis for IV-A deferment could hardly be characterized as new matter arising out of circumstances beyond the registrant's control.[13]

In sum it must be assumed that although 1625.2 purports to foreclose Board consideration of facts not previously considered if not notified within ten days of their existence or prior to issuance of an Order to Report for Induction, the Local Board in this case did give attention to these facts when they were presented. Assuming some consideration was given the facts of employment and support of the family, the question resolves into whether the Board refused to reopen petitioner's file or whether the file was reopened but the I-A classification retained. As no allegation impugning the truth of petitioner's claims for deferment was ever made and given the Circuit Court at least tentative conclusion that they could form the basis for deferment, it must be further assumed that the file was not reopened.

The distinction between determining whether to reopen a registrant's file and reopening the file but not reclassifying the registrant is one of such technical nicety as virtually to elude definition. What in fact occurs is that the registrant submits—unaided by any guidelines, either written or oral in the Selective Service regulations or from the

[13] McKart was later reclassified I-A by his Board but failed to attempt any administrative appeal or to appear for induction and refused to submit. That case comes before the Court, therefore in a posture quite dissimilar from the instant case.

Board—whatever evidence he hopes will establish his right to a deferment. That evidence is then "considered" by the Board. If the file is reopened, the right to appeal follows any Board determination. See 32 C.F.R. 1625.11.[14] If the file is not reopened, no appeal lies. It is in this grey area of refusal to reopen that the most serious damage to a registrant's rights occurs. Recognizing this situation in a case where a request for conscientious objector status was made subsequent to issuance of an Order to Report, the Court of Appeals in *Miller* v. *United States,* 388 F.2d 973 (C.A. 9, 1967) stated:

> "The local board did not deal with the alleged facts or evidence of appellant's conscientious objector form as a question of whether this legally could provide basis for a reopening to be made . . . It shortcut the situation by directly proceeding, without purporting to reopen, to a consideration of whether appellant was entitled to a conscientious objector classification on the merits of the probative elements of its file." 388 F.2d at 976.

To sanction the use of such procedure which foreclosed the possibility of administrative review of the Board's decision was held " . . . to constitute a matter of basic unfairness and hence to be, in the language of *Bolling* v. *Sharpe,* 347 U.S. 497, 499 . . . and *Schneider* v. *Rusk,* 377 U.S. 163, 168. . . . 'so unjustifiable as to be violative of due process' " 388 F.2d at 977. See also *Stain* v. *United States,* 235 F.2d 339 (C.A. 9, 1956); *United States* v. *Garcia,* 1 S.S.L.R. 3016

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[14] If the file was reopened in petitioner's case, he was never so informed and had no way of knowing that an administrative appeal was then available to him.

(1968); *United States* v. *Baker*, 1 S.S.L.R. 3017 (1968). If, as suggested, petitioner's Local Board considered the evidence presented to it on the merits subsequent to April 13, 1966, then petitioner should have been given notice of a right to appeal the Board's failure to reclassify him. Short-cutting and circumventing appellate rights by summary "refusal to reopen" can only be waived as a denial to petitioner of fundamental rights of due process requiring the attention of a federal judicial forum. The refusal of the court below to even countenance such arguments is itself a violation by the court of petitioner's right to due process of the law and should be reversed. The court below stated:

> "Moreover a registrant cannot escape the requirement that administrative remedies be exhausted by complaining, as appellant does, of a lack of due process in his local board classification. * * * Since appellant failed to take administrative steps available to him before attempting a collateral attack on his classification in a prosecution for refusing to submit to induction, his contentions before this Court are foreclosed as a matter of law." 394 F.2d at 981.

This view of what in fact was presented to the Local Board is wholly and completely erroneous. Petitioner did *not* fail to present to his Local Board any facts which he subsequently sought to raise in the criminal trial which related to matters within the Board's competence and jurisdiction. His only error in that regard was that he did not inform the Board within ten days of assuming his employment that he had done so. However, his Board "considered" those facts relating to occupational and dependency deferment when presented by relaxing the rule

of Section 1625.2 insofar as it proscribes consideration, after the Order to Report issues, of matters not newly arising out of circumstances beyond the registrant's control. That Boards are required to consider matter not before them at the prior classification if there is a prima facie case for deferment was settled by *Miller* v. *United States, supra; United States* v. *Freeman,* 398 F.2d 246 (1967); *United States* v. *Stafford,* 389 F.2d 215 (1968); *United States* v. *Gearey,* 368 F.2d 144 (1966). According to these precedents, the only way that the local boards can deny a re-opening of the registrant's classification is if the claim is patently frivolous or insubstantive. As petitioner did present a prima facie case for at least one if not two bases for deferment, his file should have been re-opened and reconsidered so that he would be afforded the right of appeal if necessary from the Local Board's decision. The failure, therefore, was not on the part of petitioner but rather on the part of the Board. Petitioner has been penalized and severely so, through no fault of his own and his conviction should therefore be reversed.

IV.

The Procedures of the Board Ignored Fundamental Due Process Criteria in Processing This Registrant.

A. The Board below either reopened this registrant's case in April and May of 1966 or it did not. If it did, then by denying him an appeal due process is lost. The Board, in order to justify a reopening must have found that the criteria of Section 1625.2 had been met, otherwise they would have refused to consider his application. That they did not do this is shown by the letters DuVernay #4 and DuVernay #6. In all likelihood they made the perfectly reasonable assumption that a 20 year old youth who finds himself with the first real steady job in his life will be compelled by his conscience to help support his mother and six brothers and sisters who had been deserted by his father many years before, and that this was a change of circumstance over which he had no real control.

However, the minutes of the board meeting of April 27th (DuVernay #9) do not show any consideration of the DuVernay case even though the letter of the 28th states otherwise (P#4). If, in fact, the board knew nothing of the two reports of oral information on file in this case (P#1 and P#2), this meant that the clerk, acting for the board, arbitrarily withheld these reports from the members, reopened this registrant's case herself, and denied his request for a hardship deferment. For the Clerk not to show the papers to the Board is an obvious denial of due process since it deprives the registrant of even the possibility of a hearing.

B. Finally, it becomes clear from the evidence here that the board had almost completely delegated its authority and responsibilities in "routine cases to the clerk" (R. 45-54). This is inconsistent with the requirement of 50 App. U.S.C. § 460 which requires that the power and authority by which these registrants are called upon to serve be first and last vested in a civilian board of their friends and neighbors.

Section 460 of Title 50 App. U.S.C.:

> "(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], together with such other duties as may be assigned under this title [said sections]: . . ."

This requirement of law does not at all compare with the following testimony of the members of Board #42:

> "Q. That's what I'm getting at, Mr. Lizana. This shows the classification of five hundred registrants, and now my question is, did you all vote on those five hundred as a group, or individually, or how?
>
> "A. Five hundred as a group—I don't quite understand your question, sir.
>
> "The Court:
>
> "Q. His question is, did you consider each case individually, or did you consider the whole group at one time in your vote.

"A. Sir, the way that is done, and it is pretty much routine with all Draft Boards, I'm sure, is that one man will say that we are classifying a man as whatever classification it may be because of such and such, and then the Board will concur on the vote.

"Mr. Smith:

"Q. Isn't it a fact, Mr. Lizana, that you and your clerk, who does most of the clerical work for you in preparing this list, just—that you just draw up a list of the names of applicants or registrants, and in this case there are five hundred eighty-four listed here, and don't you just present those to the rest of the Board and vote on them in a lump sum?

"A. Well, now, the clerk does categorize the applicants or registrants, and then the Board votes on these, but not as a lump group, but as individuals.

"Q. Mr. Lizana, are you telling us now that you voted five hundred eighty-four times that day?

"A. If that was the number of registrants, yes.

"Q. Well, this shows five hundred eighty-four registrants that day. Are you saying now that you took five hundred eighty-four ballots that day?

"A. No, not ballots, sir.

"Q. Well, how is your vote recorded?

"A. It's an oral vote.

"Q. Oral vote?

"A. Yes sir.

"Q. All right, I'll ask the question again, did you vote five hundred eighty-four times that day?

"A. If there are five hundred eighty-four names on there, I suppose I did.

"Q. I'm going to show you this document again, Mr. Lizana, and I have reference here to the first part, which says that there were five hundred eighty-four registrants classified by the Local Board that day, would you agree to that? Isn't that what it says?

"A. Yes, that's right.

"Q. Did you vote for them as a lump, as a group, or did you vote for them individually?

"A. Individually, sir.

"Q. Are you also saying, sir, that of these five hundred eighty-four votes, every one of them was a vote of five to nothing, a unanimous vote, is that right?

"A. That may be, sir. I don't know. I can't tell you just from memory on that.

"Q. Well, I would just like for you to confirm that, if you would, sir.

"A. That's what it says.

"Q. Now, do you recall voting five hundred eighty-four times, I mean of your own independent recollection, that day?

"A. No, I don't. I don't recall voting that number of times. I wouldn't be able to remember that.

"Q. You don't recall voting five hundred eighty-four times then?

"A. No sir.

"Mr. Martin:

"Q. And is it fair to say that you assign classifications to the routine cases, or maybe I should say to the ones that present no immediate problems, first, and then go on to the individual cases that might have some problem presented; is that about the way it goes?

"A. Yes sir, that's right.

"Q. And those that present problems, you discuss in pretty good detail, I take it, is that right?

"A. Yes, that's right.

"Mr. Smith:

"Q. Now, Mr. Bozonier, I note here, according to these minutes, that the classification of five hundred eighty-four people was determined by majority vote of the Board that night, is that correct?

"A. Yes.

"Q. How was that accomplished, sir? How was that vote taken on that many registrants?

"A. Well, they are categorized by the Draft Board clerk, and then they are divided up, and each of us takes so many and studies it and decides on the classification, and then we concur with one another on them.

"Q. That is more or less routine, would that be correct, Mr. Bozonier?

"A. Yes, I would say so.

"Q. Now, how about these that follow, with a little bit more description? Would you call these non-routine cases that are listed below here?

"A. Yes, that would be correct. We spend a little more time on those.

"Q. You mean the Board members?

"A. Yes, we talk to one another about them."

Not only did this clerk effectively pre-judge the registrants of this Board, including the appellant here, and also keep the minutes of the Board, but the Board members carefully described that, on one occasion (January 20, 1966) they individually considered 584 files (including DuVernay) by studying them, discussing them briefly and

then individually voting on them while later (or before) considering "non-routine" business at greater length—all in a space of three hours. If these Board members did nothing at the January meeting except consider routine matters, it would amount to some twelve seconds per registrant—due process could hardly be met by such a performance.

In short, the Board members do not present a candid or even realistic account of the internal due process of this Board's meetings. The testimony of the Board in *Peebles*[15] and *Niznik*[16] was much more believable. While those boards presented an open and admitted hostility to the registrant, these Board members attempted to conceal a laziness, an indifference, a lack of responsibility and a failure to realize the awful effect their power had over the lives of those entrusted to their care and authority.[17] This

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[15] *U.S.* v. *Peebles*, 220 F.2d 114 (1955).

[16] *Niznik* v. *U.S.*, 173 F.2d 328.

[17] This appears to be standard procedure for Board #42. Defendant's Exhibit #8 (Board minutes for March 23, 1966) shows a policeman obtaining a recommendation from the Board to the State Selective Service Director that his previously ordered induction be indefinitely postponed—a form of recall of their prior order. This amounts to a backhanded deferment, this is clearly in violation of Section 1625.3 wherein the regulations require the Board to reopen and consider anew only when the State Director requests it, and not the other way around. The pertinent provision follows:

> § 1625.3 "When Registrant's Classification Shall Be Reopened and Considered Anew.—
>
> "(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement

attitude is much more difficult to assess, to present to a jury and to attack on appeal from a record alone. Because of this, the effect is even more devastating to the registrant; it presents a much stronger case for close scrutiny of board activities, and in this case calls for a remand.

V.

Systematic Exclusion of Blacks From Service on Local Draft Board No. 42 Is a Violation of Petitioner's Rights Under the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

Systematic Exclusion of Blacks from Membership on Petitioner's Draft Board Is a Violation of the Fifth and Fourteenth Amendments.

At the hearing to quash the indictment, petitioner and the government stipulated that no member of the Negro race had served on petitioner's draft board for at least the past five years (R. 8). At trial and on appeal, appellant's efforts to raise the issue of exclusion were rejected. It was error for the Court below to refuse to consider appellant's claim, in that his showing of systematic exclusion of Negroes from his draft board established a violation of appellant's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

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of Employer (SSS Form 153) which may have been issued to the registrant."

The portion of defendant #8 referred to above is as follows:

"Request for deferment filed by the Department of Police in behalf of William T. Roth, 16 42 45 214, scheduled for induction and presently in attendance at the Police Academy was acted on by the board. The board concurred in granting the deferment, thereby requesting the State Director to cancel registrant's induction. . . . "

Pursuant to 50 U.S.C. App. § 460(b)(3) and 32 C.F.R. § 1604.52 the President of the United States appoints members of the local draft boards from recommendations made by State Governors. Traditionally, the President ratifies the Governor's recommendations without further consideration as to the qualifications or race of the people recommended. "General Hershey's top assistants can't remember a time when they ever rejected or scrutinized a man recommended by a State Governor." Hearings before the Committee on Armed Services, 89th Cong., 2d Sess. at 9919. There is nothing that indicates that recommendations made by the Governor of Louisiana were not similarly accepted (R. 7-9). The result in Louisiana of this combined State and Federal action has been to exclude black people from membership on appellant's draft board.

A showing that Negroes have been excluded from membership for the past five years presents a prima facie case of systematic and purposeful exclusion. Cf. *Whitus* v. *Georgia,* 385 U.S. 545 (1967); *Cassell* v. *Texas,* 339 U.S. 283 (1950); and *Patton* v. *Mississippi,* 332 U.S. 463 (1947). Moreover, racial discrimination by a State Governor is a direct violation of the Fourteenth Amendment, *Cooper* v. *Aaron,* 358 U.S. 1 (1958), and it is well-settled law that participation in or ratification of racial discrimination by the Federal Government is equally prohibited by the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

Having made a prima facie case it becomes the burden of the government to overcome the presumption of racial discrimination through systematic exclusion with evidence showing that the exclusion resulted from reasons other than racial discrimination. *Patton* v. *Mississippi, supra.*

The government has offered no such explanation either at the time it entered into the stipulation or anywhere in its briefs. It is not unreasonable to assume that blacks were available and eligible to serve as members of Local Board No. 42. Indeed, where there is no evidence to the contrary, this Court is obligated to assume that many black people met the statutory requirements. *Cassell* v. *Texas, supra,* at 289. To serve as a member of a local board one need only "be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction . . ." 50 U.S.C. App. 460(b)(3). With qualifications as general as these it is difficult to imagine that the government can legitimately claim that qualified black people are hard to find,[18] nor can their absence be excused on the ground that recommendations were made from personal knowledge and/or without consideration as to race. In the area of jury exclusion this Court has held that:

> "An individual's qualifications for grand-jury service however are not hard to ascertain, with no evidence to the contrary, we must assume a large proportion of the Negroes of Dallas County met the statutory requirements for jury service. When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race or color." *Cassell* v. *Texas, supra* at 289.

* * * * *

[18] In *Louisiana* v. *United States,* 225 F.Supp. 353 (E.D. Louisiana 1963), aff'd 380 U.S. 145 (1965) the court found that there were a great number of qualified black voters in the State. The qualifications for voting are certainly equal to, if not more stringent than the qualifications for membership on a local draft board.

> "'Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified Negroes available for jury service.'" *Cassell* v. *Texas, supra,* at 289, quoting from *Hill* v. *Texas,* 316 U.S. 400, 404 (1942).

In view of the availability of qualified Negroes, there is, then, no legitimate explanation for the long and continued absence of black members on appellant's draft board. The failure to recommend and appoint a black member has, necessarily, resulted in systematic racial exclusion.

Appellant has a right to be classified "in accordance with a system of selection which is fair and just . . . " 32 C.F.R. 1622.1(b), and free from "discrimination for or against him because of his race, creed, or color. . . . " 32 C.F.R. 1622.1(d). The wide range of discretionary authority available to draft boards is a potential danger to a registrant's right to be free from arbitrary and discriminatory treatment. In *Arndt* v. *United States,* 222 F.2d 484 (5th Cir. 1955) the court recognized the need for "protective safeguards". The court stated that draft boards:

> ". . . have been invested with great authority over the lives and actions of the people and that authority must be exercised only after scrupulous observance of the protective safeguards provided by the Constitution and Statutes," at 486.

In the area of jury exclusion this Court recognizes that the only protective safeguard to insure against arbitrary

and racially discriminatory treatment is to strike down systematic exclusion. *Strauder* v. *West Va.*, 100 U.S. 303 (1880). The need for the same protective safeguard is apparent in the area of exclusion from membership on draft boards. As in the case of juries charged with the responsibility of rendering fair and impartial decisions, draft boards, charged with the same responsibility under the Constitution and by statute are often subject to racial prejudices "which sway the judgment . . ., and which, therefore, operate in some cases to deny to persons . . . the full enjoyment of that protection which others enjoy." *Strauder* v. *West Va., supra,* at 309.[19]

This Court has never required a showing of actual discrimination by a jury from which black people had been systematically excluded. The apprehended or potential danger of discriminatory treatment and lack of a fair trial has been sufficient. *Strauder* v. *West Va., supra; Cassell* v. *Texas, supra; Avery* v. *Georgia,* 345 U.S. 559 (1953); and *U.S.* v. *Rabinowitz,* 366 F.2d 34 (5th Cir. 1966). Systematic exclusion of blacks from draft boards equally threatens the constitutional and statutory right of black registrants to be considered fairly and without racial discrimination. At the time of petitioner's I-A classification the chairman of his local board was a member of the Ku Klux Klan, T. 67. It is inconceivable to think that in race conscious Louisiana an all white draft board headed by a known member of the Ku Klux Klan could fairly

[19] Petitioner is concerned with his right not to have members of his race systematically excluded as distinguished from *Clay* v. *U.S.*, 397 F.2d 901 (5th Cir. 1968) and *Sumrall* v. *U.S.*, 397 F.2d 924 (5th Cir. 1968), cert. den. —— U.S. —— (1968). The 5th Circuit held in these two cases that as a matter of law there is no right to proportional representation of blacks on local draft boards.

consider registrants who are members of the Negro race. The potential for prejudicial treatment under these circumstances is increased beyond the ordinary.[20] The Klan member has been removed, Tr. 67, but appellant still had to deal with an all white board at the time of the board's refusal to grant appellant's hardship and occupational deferments. To hold that appellant is not entitled to appear before a board from which members of his race have been systematically excluded is to deny him one of the most meaningful protections against arbitrary and discriminatory treatment.

Moreover, top government officials agree that support of the Selective Service System depends upon the degree to which it is operated fairly.

> "No system of compulsory service in this country could long endure without the support of the people . . . The people of this country will support a compulsory system only to the extent that they have confidence in its fairness and they will have confidence in a system only to the extent which they themselves operate it." Hershey, Memorandum from General Hershey, S. Doc. No. 82, 89th Cong., 2d Sess. 4.

Citizen participation in the Selective Service process is a concept that was first envisioned immediately after the Civil War. (Report on S.S. p. 20.) Government officials have continued to recognize the validity and importance of this concept. "In its budget justification for fiscal 1967,

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[20] In *United States* v. *Original Knights of the Ku Klux Klan*, 250 F.Supp. 330 (E.D. Louisiana 1965) the Court ruled that the first allegiance of the Klan is to its own constitution and found "that to obtain its ends, the Klan exploits the forces of hate, prejudice and ignorance," at 334.

Selective Service characterized the local boards as little groups of neighbors on whom is placed the responsibility to determine who is to serve the nation in the Armed Forces and who is to serve in industry, agriculture, and other deferred classifications'" (Report of the National Advisory Commission on Selective Service p. 20). The reason for maintaining local boards, the members of which are neighbors from the community serviced by the board, is to assure registrants that they will be dealt with fairly. "'Because of its comparatively long association with a registrant and knowledge of what he has done, the local board is relatively well-qualified to evaluate his ability to perform'" (*ibid.*). A black registrant who appears before a board from which members of his race have been systematically excluded is not afforded the same opportunity for consideration guaranteed to white registrants. For him, there is no chance that his case will ever be considered by a member of his community who is qualified through long association and knowledge of what he has done to evaluate his ability to perform.

During the hearing on the 1967 Legislation under which this defendant was to have been inducted, "the members of the Senate recognized the importance of maintaining a draft board was
local. The chairman, Senator Russell, in responding to the proposal for a "National" Selective Service System, stated:

> "In theory, that may be very well, Mr. Marshall, but the original proposal and objective was to keep this matter as local as possible within the range of each of the Boards to which you refer, on the premise that they had information about family hardship, good faith, personal problems, and conditions that no com-

puter yet devised could possibly ascertain and that they would come as near to the facts as any group could, by knowing that they had to live in that community, with the mothers and fathers of the sons with whose lives they are dealing. * * *

"A man in his own community is going to have to look a registrant in the eye and tell him he is going to serve". *Hearings Amending and Extending the Draft Law and Related Authorities* (April 1967) ("The Senate Hearings"), p. 136.

Senator Stennis had this to say:

"Now I believe I can tell you the reasons this Board works so well, they meet on the streets the next day the very man they passed on in the afternoon of the night before. They meet the family, the mothers, the wives and all the rest in one way or another, some of these members do and they are conscious of that * * *."

"In addition to that, there is a day to day, and week by week, month by month check up on what they did and they know it, and, thinking it's part of the heart and soul and each man's way of showing the backing of the tremendous Military Program . . . (p. 142).

"We are going into the homes of these communities and taking these men out and it is better to be passed on by people who are there and know something about the circumstances" (*ibid.* p. 143).

Accordingly, in the 1967 Selective Service Legislation, there was no change in the requirement that Draft Boards be Local Boards. The Statute continues to require that

members of the Board reside in the County in which the Local Board has jurisdiction. *U.S.* v. *Peebles* (CA 7, 1955), 220 F.2d 114; *U.S.* v. *Dyer,* D.C. W.Va. 1967, 272 F.Supp. 965, affirmed 390 F.2d 611; *Muhammad Ali* v. *Connally,* D.C. Tex. 1967, 266 F.Supp. 345; *U.S.* v. *Salamy,* D.C. Okl. 1966, 253 F.Supp. 616, affirmed 379 F.2d 838. This dealing with policy, the registrant and the Statute has been enforced by the Selective Service System on a continuing basis. See *Report of the National Advisory Committee on Selective Service, supra.*

In addition to the requirement of a "community board of neighbors", to insure that draft boards are representative of the conscience of the community, 50 App. § 460(b)(3) prohibits the exclusion of women. Surely it is unthinkable and contrary to the holdings of this Court to conclude that women have a lawful right to serve as members, but that black men, although protected from racial discrimination by the United States Constitution, have no such right. A Selective Service System that denies to the black man the opportunity to participate, but extends that right to all others, is unfair, unrepresentative of the people and fails to instill confidence in the System's fairness. Unless black people are made to feel that they, as well as their white brothers share in the operation and administration of the Selective Service System, in the words of General Hershey, "No system of compulsory service in this country could long endure."

The constitutionality of the conscription laws has been sustained upon the proposition that it is a duty of citizenship to serve in the military services when compelled to do so. Justice White noted in the *Selective Draft Law* cases, 245 U.S. 366 (1918) that:

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in the case of need and the right to compel it," at 378.

The concept of citizen responsibility for military service in return for the rights and privileges of citizenship was not original with the *Selective Draft* cases. It is a principle deeply rooted in the history and traditions of this nation. That military service is conditioned upon citizenship and the government's guarantee that rights of citizenship will be protected was dramatically, and in no uncertain terms, stated in *Dred Scott* v. *Sandford,* 19 How. 393, 60 Sup.Ct. 691 (1857). Justice Taney, speaking for the Court, proved that black men were not United States citizens by demonstrating that the highest duty of citizenship, service in the militia, was unavailable to persons of African descent. Black men:

> "By the laws of New Hampshire, collected and finally passed in 1815, no one was permitted to be enrolled in the militia of the State, but free white citizens; and the same provision is found in a subsequent collection of the laws, made in 1855. Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded because, being born in a foreign country, he cannot be a member of the community until he is naturalized. *But why are the African race, born in the State not permitted to show in one of the highest duties of citizens? The answer is obvious, he is not by the institutions and laws of the State, numbered among its people. He forms no part*

of the sovereign of the State, and is not therefore called on to uphold and defend it," at 415. (Emphasis added.)

The stigma of inferiority legally followed the black man, whether slave or free, until the enactment of the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. These amendments were designed to confer citizenship upon the black man, *Slaughter-House* cases, 16 Wall. 36 and in particular the Thirteenth Amendment was designed to eradicate badges and indicia of slavery. *Jones* v. *Alfred H. Mayer Co.*, 88 S.Ct. 479 (1968). Without the complete elimination of the badges and indicia of slavery that maintained the black man in a status of inferiority he will never be a free and equal citizen. The right of citizenship is indeed a hollow right without constitutional and judicial protection against badges and indicia of slavery. Indeed, to deny protection against the stigma of inferiority is "to grant the right but in reality to withhold its privilege and enjoyment". *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961).

The black man is now required to serve in the military as a citizen of the United States, although he is still stigmatized every day of his life by the badges and indicia of slavery. (See Douglas, concurring opinion in *Jones* v. *Alfred H. Mayer Co., supra.*) His white brother serves because he is a full and equal citizen of this country and is guaranteed state, federal and constitutional protection of his rights as a free citizen. Under the principles of the *Selective Draft* cases, and *Scott* v. *Sandford, supra,* no man is required to offer his life or his body in defense of this nation unless he is a free and equal citizen. This

necessarily means that the federal government will protect his rights as a member of the sovereign body of people called the United States of America.

Only white persons who were citizens of the United States, according to Taney, could serve in the militia. Necessarily, then, only white citizens could participate in the administration of the militia. Black men in this country now have the duty to serve, but are still denied the corresponding right of citizenship to participate in the administration and operation of the Selective Service process. To hold that the black man has a duty to serve as a citizen, but does not have a corresponding right to serve as a member of his draft board is to admit that he is in fact not a full and equal citizen. Such a holding would fly in the face of the guarantees promised by the Constitution of the United States over a hundred years ago.

Constitutional safeguards against arbitrary and discriminating treatment extend to all authorities who "have been invested with great authority over the lives and actions of people." *Arndt* v. *United States, supra* at 486. There is no doubt that had there been actual discrimination against petitioner his constitutional rights would have been upheld by invalidation of the induction order. *Estep* v. *United States,* 327 U.S. 114 (1946). Petitioner, however, has a right not only to be free from actual discrimination but from the threat of potential discrimination as well. *Strauder* v. *West Va., supra.* This Court must fashion judicial remedies that meet realities. *Brooks* v. *Beto, supra.* The jury exclusion cases teach us that the only realistic remedy is to void the order, for it is only then that the potential evils inherent in systematic exclusion are effectively eliminated. Even more reason for protecting the

right against potential discrimination is that it is, in itself, a constitutional safeguard against deprivation of the right to be free from actual discrimination.

By statute petitioner is guaranteed that he will be treated and classified free from racial discrimination. Systematic exclusion of members of his race from membership on petitioner's board violates that guarantee." The authority of the local boards whose orders are the basis of ". . . criminal prosecutions is circumscribed both by the Act and by the regulations." *Estep* v. *United States, supra* at 120. "These rules limit, as well as define, their jurisdiction." *Id.* at 121. A local board, then, whose composition violates the statutory guarantee of non-discriminatory treatment is acting outside of its lawful jurisdiction and its order must be voided.

The due process infirmities exhibited in the record herein infect the Order to Report for Induction so fundamentally as to necessitate its cancellation. It cannot be gainsaid that the recondite procedures of the petitioner's Local Board were unknown to him and that no attempt was ever made to inform him of his rights in any meaningful manner. The assumed failure of the Local Board to reopen petitioner's file, at the very least, to consider his undeniable prima facie claim for occupational or hardship deferment must be reversed and the Board ordered to at least consider the evidence submitted. If a failure to reclassify petitioner at that time results, he will have an opportunity to pursue an administrative appeal.

Unless this Court orders a reversal of the conviction herein, petitioner will be sent to jail for five years without any competent forum ever reviewing his constitutional

claims. To allow this result would be to deny petitioner the most fundamental guarantees of a democratic society: a court of law in which he can, within the rule of law, present his grievances.

Petitioner therefore respectfully urges this Court to reverse the conviction and affirmance thereof by the courts below and to cancel his Order to Report for Induction, thereby allowing him the opportunity to fully and fairly present his case and have it heard.

Respectfully submitted,

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LAW APPENDIX

Statutory Provisions

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIII—Slavery Abolished

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Selective Service Act of 1967

§ 462. Offenses and penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any

way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts to the trial of laws arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of non-residence, or any other certificate issued pursuant to or prescribed by the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or

in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title [said sections] or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever at trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

(c) The Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal upon the request of the Director of Selective Service System or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so.

June 24, 1948, c. 625, Title I, § 12, 62 Stat. 622; Aug. 30, 1965, Pub. L. 89-152, 79 Stat. 586; June 30, 1967, Pub. L. 90-40, § 1(11), 81 Stat. 105.

1625.1 CLASSIFICATION NOT PERMANENT.—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any

fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.11 CLASSIFICATION CONSIDERED ANEW WHEN REOPENED.—When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.13 RIGHT OF APPEAL FOLLOWING REOPENING OF CLASSIFICATION.—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

1625.14 CANCELLATION OF ORDER TO REPORT FOR INDUCTION OR FOR CIVILIAN WORK BY REOPENING OF CLASSIFICATION. —The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply.